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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

MICHAEL SCHMIDT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Will a naturalized citizen be deprived of citizenship on summary judgment because, without actual knowledge or participation in any act of persecution, that citizen had the status of guard outside the walls of a German prison within which wrongful acts occurred.

2. Is actual knowledge of persecution required as part of the proof for denaturalization.

3. May a summary judgment be entered denaturalizing a citizen when the citizen denies, under oath, any knowledge of any act of persecution by anyone at the prison outside of which he was employed as a guard, and when there is no evidence that he did have such knowledge.

4. Is it sufficient to denaturalize that a citizen was a member of the "SS" during World War II, in a unit which had a guard function at a German prison within which persecution occurred, without any showing that the citizen had actual knowledge of any act of persecution.

5. A conflict exists between the Ninth and Second Circuits, which hold that "persecution" requires some proof of an act assisting in persecution, and the Seventh Circuit, which holds that presence at a place where persecution occurs (even without knowledge) is persecution.

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OPINIONS BELOW AND STATEMENT OF JURISDICTION

1. In a 2-1 decision, dated January 30, 1991 (Appendix A), the United States Court of Appeals for the Seventh Circuit affirmed the January 3, 1990 Order (Appendix D) of the Honorable Judge Paul E. Plunkett of the United States District Court for the Northern District of Illinois, Eastern Division, granting summary judgment in favor of the Government denaturalizing the defendant, Michael Schmidt. Jurisdiction of the District Court in denaturalization proceedings is based on 8 U.S.C. sec. 1451.

2. By Order dated June 4, 1991, the United States Court of Appeals for the Seventh Circuit denied Petitioner's Request for Rehearing with Suggestion for Rehearing En Banc. (A copy of which is attached as Appendix C.)[1]

3. Jurisdiction of this Court is based on 28 U.S.C. sec. 1254(1), providing for review by writ of certiorari to the Court of Appeals.

STATUTES INVOLVED

1. Section 13 of the Displaced Persons Act of 1948, Pub. L. No. 80-774, ch. 647, 62 Stat. 1009, 1014, as amended by Pub. L. No. 81-555, ch. 262, 64 Stat. 219, 227 (1950)

"No visas shall be issued under the provisions of this Act, as amended, to any person who is or has been a member of the Communist Party, or to any person who adheres to, advocates, or follows, or who has adhered to, advocated, or followed, the principles of any political or economic system or philosophy directed toward the destruction of free competitive enterprise and the revolutionary overthrow of representative governments, or to any person who is or has been a member of any organization which has been designated by the Attorney General of the United States as a Communist organization, or to any person who is or has been a member of or participated in any movement which is or has been hostile to the United States or the form of government of the United States, or

[1] Appendix references to the "Memorandum Opinion and Order" of the District Court shall be "DC p.-"; Appendix references to the Opinion of the Seventh Circuit shall be "CA p.-".

to any person who advocated or assisted in the persecution of any person because of race, religion, or national origin, or to any person who has voluntarily borne arms against the United States during World War II. Upon arrival at the port of entry in the United States, every person eighteen years of age or older authorized to be admitted under this Act, shall take and subscribe an oath or affirmation that he is not and has never been a member of any organization or movement named in this section, and shall be liable to prosecution for perjury if such oath or affirmation is willfully false. If any person not entitled to a visa under this section shall nevertheless gain admission to this country, in addition to the penalty above-mentioned, such person shall, irrespective of the date of his entry, be deported in the manner provided by sections 19 and 20 of the Immigration Act of February 5, 1917, as amended."

2. 8 U.S.C. sec. 1427(a)

"Requirements of Naturalization

(a) Residence

No person, except as otherwise provided in this subchapter, shall be naturalized unless such petitioner, (1) immediately preceding the date of filing his petition for naturalization has resided continuously, after being lawfully admitted for permanent residence, within the United States for at least five years and during the five years immediately preceding the date of filing his petition has been physically present therein for periods totaling at least half of that time, and who has resided within the State in which the petitioner filed the petition for at least six months, (2) has resided continuously within the United States from the date of the petition up to the time of admission to citizenship, and (3) during all the period referred to in this subsection has been and still is a person of good moral character, attached to the principles of

the Constitution of the United States, and well disposed to the good order and happiness of the United States."

3. 8 U.S.C. sec. 1451(a): "Revocation of naturalization

(a) Concealment of material evidence; refusal to testify

It shall be the duty of the United States attorneys for the respective districts, upon affidavit showing good cause therefore, to institute proceedings in any court specified in subsection (a) of section 1421 of this title in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground that such order and certificate of naturalization were illegally procured or were procured by concealment of a material fact or by willful misrepresentation, and such revocation and setting aside of the order admitting such person to citizenship and such canceling of certificate of naturalization shall be effective as of the original date of the order and certificate, respectively: *Provided*, That refusal on the part of a naturalized citizen within a period of ten years following his naturalization to testify as a witness in any proceeding before a congressional committee concerning his subversive activities, in a case where such person has been convicted of contempt for such refusal, shall be held to constitute a ground for revocation of such person's naturalization under this subsection as having been procured by concealment of a material fact or by willful misrepresentation. If the naturalized citizen does not reside in any judicial district in the United States at the time of bringing such suit, the proceedings may be instituted in the United States District Court for the District of Columbia or in the United States district court in the judicial district in which such person last had his residence."

STATEMENT OF THE CASE

Petitioner Michael Schmidt, a naturalized citizen of the United States for twenty-three years, had his citizenship revoked, on summary judgment, on January 3, 1990. The District Court, having jurisdiction pursuant to 8 U.S.C. sec. 1451(a), granted the Government's motion for summary judgment, finding Schmidt assisted in the persecution of "any person because of race, religion, or national origin" based on Schmidt's service in the SS as a guard at Sachsenhausen. The District Court found that Schmidt's position as a guard was *alone* sufficient to establish Schmidt's assistance in persecution, stating "it is irrelevant whether . . . he ever personally committed any atrocities," DC p. 36, and that "whether he knew that they [prisoners] were unjustly imprisoned, that their living conditions were atrocious, or that other guards abused them is irrelevant." DC p. 37. Because of this finding, the District Court held Schmidt was not lawfully admitted into the United States and, therefore, could not lawfully obtain citizenship, relying upon the Displaced Persons Act of 1948 (see, "Statutes Involved," *supra*).

On appeal, the Seventh Circuit affirmed. Following its reading of *Fedorenko v. United States*, 449 U.S. 490 (1981), the Court stated "it is clear that service as an armed concentration camp guard constitutes assisting in persecution under the [Displaced Persons Act]." CA p. 9. The majority dismissed Schmidt's evidence and argument that he did not know of the acts occurring behind walls he was not permitted to pass, and that he brought no harm to anyone. The Court stated: "Whether or not Schmidt personally engaged in acts of violence, however, does not affect our conclusion that he assisted in persecution," CA p. 11.

In a dissenting opinion, Judge Pell noted the lack of evidence that Schmidt knew of or participated in any acts of persecution. Disagreeing with the majority, Judge Pell stated "I cannot conceive how a person can be rendering assistance in persecution without some showable knowledge, or at the very least evidence of facts known to him which could lead only to a conclusion that the work prisoners were being persecuted." CA p. 14. Judge Pell disagreed with the majority's opinion that *Fedorenko* removed the requirement for personal involvement in or knowledge of acts of persecution; and, stating "[o]ur system of justice that guilt should not be predicated on anything less than a fair trial is too important to tolerate any deviation or diminution," maintained that Schmidt was entitled to a trial. CA pp. 15-16.

The evidence concerning Schmidt which the District Court did receive demonstrated Schmidt is a Romanian born ethnic German. His parents, now deceased, were farmers. His education ended at age fifteen (15), with confirmation in the Church. After that, he worked on his Father's farm in the Scharosch District.

The Schmidt Family had no radio and did not receive a newspaper. Prior to 1943, Schmidt had not heard of the "SS". He belonged to no political groups of any kind. He did belong to Lutheran Church groups.

Schmidt attended a German recruitment meeting. The young men were told that if they joined the German military they would not be subject to the Romanian draft. Schmidt understood that the Romanian draft was being taken over by the Germans as it applied to ethnic Germans.

Schmidt reported for his medical and appeared before three (3) German officers. After considering his diminutive size, his papers were torn up and he was told to go away.

Schmidt went home and continued to work on his Father's farm.

Sometime later, Schmidt received a notice to report "to the neighbor town for draft." A friend had signed up in Schmidt's absence at a subsequent meeting. That paper did not mention the SS; Schmidt understood that he was to become a "German soldier." He did not know at the time of the division of the German military into SS and Wehrmacht.[2]

Schmidt got on the train to Vienna on June 20, 1943. He was then shipped to Oranienburg, a Suburb of Berlin, in civilian clothes. There he was given a uniform and sworn in. Schmidt knew that he was in the SS, and the overall unit which he recalls is "Goetz von Berlichingen." Schmidt served with the same squad leaders, soldiers and officers until wounded in combat in November, 1944. Some of his colleagues had "Goetz von Berlichingen" on their uniforms, some did not.

Schmidt began his "boot" training at Oranienburg sometime in July, 1943. He had small arms and grenade training, marching and military discipline. Schmidt did not receive political training in what the examiner called "Nazi philosophy." During his training period, which lasted six (6) to eight (8) months, he would also escort prison work parties from the gate at Sachsenhausen to places of work in the Oranienburg community. The prisoner foreman knew where to go; at times he would be the only guard, and at other times there were other guards. The prisoners and guards would walk to work through residential areas of Oranienburg. The work was principally in a machine

[2] The Germans generally assigned ethnic Germans from other countries to the SS, with Germans going into the Wehrmacht.

shop or, in the Fall, on farms. The prisoners would bring back produce to the prison.

Other than in training, Schmidt never fired his weapon. Schmidt had no rank; in his words, he was "Soldier, plain." His barracks were across the street from the Sachsenhausen prison, in Oranienburg. The guards who worked inside the camp were in other barracks and other units, as were intelligence units and interpreters. Schmidt never saw over the prison wall and was never inside. He was, by regulation, forbidden to go inside. Schmidt never saw a prisoner die, never saw a dead prisoner and never saw a prisoner beaten or harmed.

Schmidt knew of homosexual prisoners; he thought that they wore purple patches. He did not know what other people were there. Specifically, he did not know of Sachsenhausen as a place for the imprisonment of Jews. It was his understanding that prisoners were there, because of some violation of German law, which he did not claim to understand.

In August, 1944 (after the Normandy invasion and the attempt on Hitler's life), Schmidt's unit was ordered into combat. In Schmidt's first battle he was severely wounded, suffering a loss of a portion of his arm. He did not know where he was; the prosecutor suggested "Lorraine", which was then Germany, but is now France. He was hospitalized, and was captured by the British Army at the end of the War, in May, 1945.

Schmidt received his certificate of naturalization in 1968, after immigrating to the United States from Germany in 1952. For the nearly forty years Schmidt has lived in the United States, he worked as a janitor in Chicago, Illinois and is now retired. Schmidt is married with two children, and one grandchild.

ARGUMENT

A.

THIS COURT HAS NEVER HELD THAT DENATURALIZATION WITHOUT PROOF OF FAULT IS THE LAW OF THE LAND. THE SEVENTH CIRCUIT HAS NOW SO HELD. THIS MAKES CITIZENSHIP DEPENDENT ON STATUS, NOT ON CONDUCT, AND IS WRONG.

All of the prison-camp guard cases in which denaturalization has been ordered or considered have involved some consideration of the acts of the guard-now-citizen. In *Kungys v. United States*, 485 U.S. 759 (1988), the Government attempted to show that the citizen had acted to assist the Nazis in the mass arrest and execution of Jews in Lithuania. In *Fedorenko v. United States*, 449 U.S. 490 (1980), the citizen fired a rifle at fleeing prisoners, and had direct knowledge of the persecution and murder of multitudes of prisoners. In no case was there a citizen who lost his citizenship only because of his status, and not because of his conduct.[3]

We emphasize that this case is not here on a claim of visa fraud; it is here because the Court held that it constituted persecution under the Displaced Persons Act ("DPA") for Michael Schmidt to be in an SS uniform at

[3] The issue of assistance in persecution arose in *Fedorenko* in the context of determining whether a misrepresentation on an application for a visa was material. If Fedorenko's "particular conduct" constituted assistance in persecution, the conduct would be material to the decision to grant a visa; and, misrepresentation of this conduct would be grounds to revoke his citizenship. In Schmidt's case, however, he disclosed his service in the SS during the war at every stage of the naturalization process. Summary judgment was entered only on the "persecution" charge.

the outer perimeter of the Sachsenhausen prison near Berlin in 1943. There is no claim that Schmidt persecuted personally, and no proof at all that he had knowledge of anyone else persecuting. The prison was in a built-up urban area at Oranienburg, a Berlin suburb, and was not in the isolated Eastern countryside, as were the "death" camps Auschwitz and Treblinka. No automatic inference arises from presence such as might arise in the case of a guard at Treblinka.

The lower Courts held that presence in the uniform of the SS at the prison in a guard capacity constitutes "persecution." This Court has said, in *Fedorenko*, that we should focus on "whether particular conduct can be considered assisting in the persecution of civilians." 449 U.S. at 513. The Court here focused only on the status, and not on conduct.

We submit that it is important to all naturalized citizens and their descendants . . . all native born Americans, of whom there are many . . . whether or not status and presence, without more, is sufficient for summary judgment denaturalization. If so, the ruling will have long and grave consequences for many families, and, if good for America, such good will be hard to perceive. If not, then naturalized citizens who are not war criminals and who had no knowledge of the prohibited persecution can, at least, know that they will not be deprived of citizenship after forty years without trial focused on their conduct.

The Seventh Circuit has pared back the *Fedorenko* focus on conduct to such an extent that it now applies a *per se* rule: a prison guard, regardless of his individual conduct or knowledge of the conduct of others, is deemed to have assisted in persecution.

Referring to cases in which there was direct evidence of persecution or knowledge of persecution, the District Court stated "it is irrelevant whether Schmidt voluntarily joined the SS and whether he ever personally committed any atrocities. . . Whether he knew [the prisoners] were unjustly imprisoned, that their living conditions were atrocious, or that other guards physically abused them, is irrelevant. . . No proof of actual knowledge need be presented." (DC pp. 36, 37, 38). *United States v. Kairys*, 782 F.2d 1374 (7th Cir. 1986), *Schellong v. I.N.S.*, 805 F.2d 655 (7th Cir. 1986) and *Kulle v. I.N.S.*, 825 F.2d 1188 (7th Cir. 1987) were cited in support of this "*per se*" rule. The District Court then held that Schmidt's guard service alone was sufficient to revoke his citizenship, stating:

> Therefore, we hold that no proof that Schmidt knew precisely what was going on within the camp is necessary to find that he assisted in the persecution that was in fact occurring. We hold that the government is entitled to summary judgment on Count I, which seeks denaturalization on the ground that Schmidt was not lawfully admitted into the United States because he in fact assisted in the persecution of persons because of their race, religion or national origin *by serving as an armed guard at Sachsenhausen concentration camp.* (DC p. 38, emphasis added).

Schmidt argued on appeal that the Government presented no evidence that he, Michael Schmidt, persecuted anyone while a prison guard, or that he knew that persecution of civilians even took place at Sachsenhausen. The Court summarily dismissed Schmidt's argument.[4] In re-

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[4] Although the position of the Ninth Circuit in *Laipenieks v. I.N.S.*, 750 F.2d 1427 (9th Cir. 1985) (discussed *infra*), focusing on the individual's conduct, was raised and argued in Schmidt's briefs, and was cited in the dissenting opinion of Judge Pell, the majority opinion ignored *Laipenieks*.

jecting Schmidt's plea to evaluate him as an individual rather than simply "a guard," the Seventh Circuit professed to rely on *Fedorenko*, stating: "As we held in *Kulle* and the Supreme Court held in *Fedorenko*, an armed guard at a Nazi concentration camp is not eligible for a visa under the Displaced Persons Act." CA p. 12. The Seventh Circuit based its conclusion on its prior finding in *United States v. Kairys*, 782 F.2d 1374, 1378 (7th Cir. 1986) that "*Fedorenko* continues to stand for the proposition that service as an armed guard equals persecution," CA p. 10, and its finding in this case, again premised on its reading of *Fedorenko*, that "it is clear that service as an armed concentration camp guard constitutes assisting in persecution under the DPA." CA p. 9. Thus, *Fedorenko* is read to focus only on status and not on conduct or knowledge.

In essence, the Seventh Circuit took Justice Marshall's description of Fedorenko in footnote 34 of the decision and removed its most essential detail—the detail which focuses on the persecutive conduct of the individual in question (Fedorenko admitted to shooting at prisoners). The other characteristics listed by Justice Marshall in describing Fedorenko, that he wore a uniform, carried a gun and was paid and given leave, are not acts of persecution, but did show he worked willingly at a death camp.

This short-hand analysis, based on status, and not on conduct or knowledge, creates a "no fault" denaturalization that simplifies the procedure at a destructive cost to any perception of the value of citizenship by naturalization. As Justice Stevens observed in a concurring opinion, "American citizenship is 'a right no less precious than life or liberty.' " *Kungys v. United States*, 485 U.S. 759, 785 (1988) (citation omitted). Considering what is at stake,

expediency and convenience for the prosecution must not be a consideration.

This cheapening of the process considered due for the naturalized citizen contradicts prior decisions of this Court, requiring an extraordinary burden of proof such that citizenship may be revoked only if the Government establishes its case by "clear, unequivocal and convincing" proof, which "does not leave the issue in doubt." *Fedorenko*, 499 U.S. at 505 citing *Schneiderman v. United States*, 320 U.S. 118, 125 (1942), and quoting *Maxwell Land-Grant Case*, 121 U.S. 325, 381 (1886). Justice Marshall observed in *Fedorenko*:

> our decisions have recognized that the right to acquire American citizenship is a precious one, and that once citizenship has been acquired, its loss can have severe and unsettling consequences. . .
>
> Any less exacting standard would be inconsistent with the importance of the right that is at stake in a denaturalization proceeding.

449 U.S. at 506-507 (citations omitted).

Justice Stevens, stated in *Kungys*: "Without evidence of any wrongdoing before he came to the United States in 1948 or after he acquired his citizenship in 1954, the revocation of petitioner's citizenship—a punishment that is tantamount to exile or banishment—is patently excessive." 485 U.S. at 791.[5] The reason for this is clear:

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[5] Justice Brennan, in *Kungys*, also emphasized the need for the Government to carry its extraordinary burden of proof by *producing evidence* of a disqualifying fact, stating: "a presumption of ineligibility does not arise unless the Government produces evidence sufficient to raise a fair inference that a statutory disqualifying fact actually existed." 485 U.S. at 783.

> To take away a man's citizenship deprives him of a right no less precious than life or liberty, indeed of one which today comprehends those rights and almost all others. To lay upon the citizen the punishment of exile for committing murder, or even treason, is a penalty thus far unknown to our law and at most but doubtfully within Congress' power. US Const, Amend VIII. Yet by the device or label of a civil suit, carried forward with none of the safeguards of criminal procedure provided by the Bill of Rights, this most comprehensive and basic right of all, so it has been held, can be taken away and in its wake may follow the most cruel penalty of banishment.
>
> No such procedures could strip a natural born citizen of his birth right or lay him open to such a penalty.

Klapprott v. United States, 335 U.S. 601, 616-617 (1949). This noble language is surely inconsistent with a legal system that will terminate citizenship on a status test.

The Seventh Circuit's analysis attributes characteristics of the group, rightly or wrongly, to the individual, and misreads *Fedorenko* beyond its holding. It is based on the false premise that "we know what **they** did and since you are one of **them**, you must have done it too." Such assumptions are repugnant to our system of justice. *See Schneiderman v. United States*, 320 U.S. 118 (recognizing "infirmities of proof by imputation"); *Baumgartner v. United States*, 322 U.S. 665 (1944). Furthermore, an individual's freedom to rise above the worst of those in his assigned group is destroyed when the individual's conduct is "irrelevant."

Finally, the depravity of the conduct of the group does not justify acceptance of a status test. Because denaturalization proceedings have been equated with criminal pro-

ceedings,[6] a contemporary example from the criminal law is illustrative. Our society is continually waging a "war on drugs." We enact tough laws, we increase our police forces, we build more prisons, all in an effort to prevent the devastation of drugs. And, in this war, we in cities like Chicago "know" certain things, such as gang involvement in the sale and distribution of drugs. Yet, despite the fact that we "know" gang groups sell drugs to our children in schoolyards, and that we "know" gangs continuously engage in drug related violence among themselves and against others, we still focus on the conduct of the individual and not on his association. This protection of the individual, accorded to citizen and non-citizen alike, is fundamental to the freedoms of our society. It is part of our unique concept of due process and a jurisprudence which focuses on what an individual has done instead of who he or she is; it is one of the invaluable tenets which demonstrates the difference between our society and the Nazis. Their view was to deal in groups; they did not "focus on the individual." Their view, in its ultimate imposition, set the record for inhumanity. We should not take even the first step.

Thus, because the misreading of *Fedorenko* has resulted in the application of a status based test, we ask this Court to issue its writ and to hold that denaturalization must be based on conduct or knowledge, and not on status.

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[6] "because of the grave consequences incident to denaturalization proceedings we have held that a burden rests on the Government to prove its charges in such cases by clear, unequivocal and convincing evidence which does not leave the issue in doubt. . . This burden is substantially identical with that required in criminal cases—proof beyond a reasonable doubt. *Klapprott v. United States*, 335 U.S. at 611-612 (citations omitted).

B.

THERE IS A CONFLICT BETWEEN THE CIRCUITS AS TO WHETHER PROOF OF AN ACT OF PERSECUTION IS REQUIRED.

An individual residing within the jurisdiction of the Seventh Circuit of the United States Court of Appeals may have his or her citizenship revoked based on who that individual is—to which group he or she belongs or may be assigned—and not based on that individual's actions. The Seventh Circuit says that being a prison guard is alone sufficient to support revocation of an individual's United States citizenship. The Second and Ninth Circuits require proof that an individual personally participated in acts of persecution before it will revoke citizenship or permit deportation. This is a conflict which should be resolved.

1. The Seventh Circuit.

The Seventh Circuit in Schmidt's case found proof of bad conduct or knowledge unnecessary because the individual's actions are irrelevant, stating: "even if Schmidt personally did not participate in the brutal acts committed at Sachsenhausen, the fact of his armed, uniformed service is sufficient to establish that he assisted in persecution." CA pp. 10-11. The Court also held that his knowledge of wrongs done by others is irrelevant. No other Court has gone so far to trivialize citizenship.

In *United States v. Kairys*, 782 F.2d 1374 (7th Cir. 1986), the Seventh Circuit stated that, in its view of *Fedorenko*, an individual's conduct is irrelevant to his denaturalization proceeding:

> In *Fedorenko*, the Supreme Court *held* as a matter of law that service as a Nazi concentration camp guard equaled persecution of civilians for purposes

> of the DPA *without proof of personal involvement in atrocities*. (449 U.S. at 512-13 n. 34, 101 S.Ct. at 750, n.34).

782 F.2d at 1377, n.3 (emphasis added). *Kairys* did not, however, go to the extent of "no fault denaturalization" found in Schmidt's case.

Despite the Supreme Court's use of the phrase "particular conduct," and its examination of what certain individuals did, the Seventh Circuit determined the Supreme Court *held* that no proof of personal involvement in persecution is required to revoke citizenship. In *Schmidt*, this rule is extended to say that no *knowledge* of persecution need be shown.

The Court, in *Schellong v. I.N.S.*, 805 F.2d 655, 661 (7th Cir. 1986), rejected the positions of the Second and Ninth Circuits, discussed infra, which require proof of active or personal participation, stating:

> Insofar as these cases hold that personal involvement in atrocities is necessary to have assisted in persecution for purposes of the DPA or the Holtzman Amendment, they conflict with *Fedorenko*, 449 U.S. at 512, n.34, 101 S.Ct. at n.34 [sic].

The Seventh Circuit does not view denaturalization as particularly significant; in *Kulle v. I.N.S.*, 825 F.2d 1188 (7th Cir. 1987), the Court dismissed a due process claim by noting that "[t]his is not a criminal proceeding and the 'punishment' is not hanging." 825 F.2d at 1193. In *Kulle*, actual knowledge of persecution arose from presence for a long time at a concentration camp, rank and participation in a movement of prisoners on open train cars in midwinter from Gross Rosen to Mauthausen under inhumane conditions. That level of proof does not exist in Private Schmidt's case.

The Seventh Circuit thus holds that any member of the group of persons who guarded German prisons during World War II assisted in persecution, whether or not they did a persecutorial act, and whether or not such person had knowledge of persecution.

2. The Second Circuit.

In *United States v. Sprogis*, 763 F.2d 115 (2d Cir. 1985), the Second Circuit considered whether a naturalized United States citizen from Latvia, who was an Assistant Chief of Police for a Latvian town during the Nazi occupation of his area, had assisted the Nazi persecution of Jews. The Second Circuit examined cases involving civilian persecution and concluded:

> The clearest cases of assistance in persecution have been those in which an individual, often while employed at a concentration camp, has *personally arrested or fired* on detained civilians, or has ordered others to do so. . . In other cases, courts have characterized less hostile conduct as assistance in persecution, but in each of those cases, the individual condemned as a persecutor had *actively participated* in some act of oppression directed against persecuted civilians. *Sprogis*, 763 F.2d at 122 (citations omitted, emphasis added).

Sprogis admitted he was a ranking police officer while the Nazis occupied his area and detained and executed Jews. He also admitted he was present while Jews on their way to an extermination area were detained by his policemen, subject to his orders, at his police station.[7] Yet, based on the evidence, the Court concluded that Sprogis

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[7] Whether he gave the order to guard the Jews was controverted at trial. 763 F.2d at 119.

was simply present while the Jews were detained, that any other acts were just administrative in nature[8] and that "these were not acts of oppression. They do not amount to the kind of *active assistance* in persecution which the [Displaced Persons Act] condemns." 763 F.2d at 122 (emphasis added). The Second Circuit then affirmed the District Court's decision that "the government failed to prove clearly, unequivocally and convincingly that Sprogis, while serving as a police officer, personally assisted in persecuting civilians." 763 F.2d at 123.

Thus, despite the assistance of the local police, of which Sprogis was not only a member but a supervising officer, in the Nazi persecution of Jews, the Second Circuit focused on the conduct of Sprogis and determined that he did not personally assist in any of the atrocities committed by either the Nazis or the local police and civilians. *Sprogis* focuses on the kind and degree of the citizen's conduct. *Schmidt* focuses only on status.

3. The Ninth Circuit.

The Ninth Circuit has required proof of active personal involvement in acts of persecution even when less than United States citizenship is at stake. In *Laipenieks v. Immigration and Naturalization Service*, 750 F.2d 1427 (9th Cir. 1985), the petitioner was a Latvian immigrant, admitted in the United States in 1960. He was never naturalized. The Immigration and Naturalization Service ("INS") brought deportation proceedings against him

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[8] The Nazis confiscated Jews' property when they were removed from their homes and taken to be executed. Sprogis signed papers recording the disposition of this property. Sprogis also paid farmers who had transported Jewish prisoners to the police station and recorded these payments. 763 F.2d at 122.

alleging that he assisted in the persecution of persons on the basis of political opinion. Laipenieks was accused of beating prisoners while a member of the Latvian Political Police (the "LPP"), an organization formed to investigate and arrest those who participated in atrocities while the Soviet Union occupied Latvia from June, 1940 until Nazi occupation in June, 1941. The INS contended Laipenieks' assistance in persecution rendered him deportable under section 241(a)(19) of the Immigration and Nationality Act, 8 U.S.C. sec. 1251(a)(19).

The Ninth Circuit first analyzed the relationship and similarity of purpose of Sec. 1251(a)(19) to Section 10 of the Displaced Persons Act.[9] Quoting footnote 34 of *Fedorenko*, the Ninth Circuit noted the Supreme Court's rejection of the "voluntariness" analysis and observed: "*Fedorenko* stated that the proper analysis under the statute was whether the *acts of the individual* amounted to assisting in the persecution of civilians." 750 F.2d at 1431 (emphasis added).

The Court then analyzed the meaning of "assisting in persecution" through examination of *Fedorenko*, cases applying section 10 of the DPA after *Fedorenko*, as well as the statutory history of Section 1251(a)(19), and concluded:

> We find that the language and intent of Section 1251(a)(19) requires that deportability may only be sustained when the evidence establishes that the individual in question personally ordered, incited, assisted or otherwise participated in the persecution of individuals . . .

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[9] The Court noted the DPA renders a person ineligible for displaced person status if he "assisted the enemy in persecuting civil[ians] . . ." 750 F.2d at 1430, citing *Fedorenko*, 449 U.S. 490.

> Second, the intent of the legislation demonstrates that *active personal involvement* in persecutorial acts needs to be demonstrated before deportability may be established. . .
>
> In sum, guided by *Fedorenko*, the language of the statute, and the legislative intent, we find that Section 1251(a)(19) requires in the instant case, that the government provide proof of personal active assistance or participation in persecutorial acts before deportability may be established.

750 F.2d 1431-1432 (emphasis added).

There was evidence at Laipenieks' deportation hearing that the group to which he belonged, the LPP, collaborated with the Nazis to apprehend Communists and other suspected Soviet sympathizers. There was further evidence that individuals were imprisoned by the LPP for political beliefs. This evidence was the basis of the decision of the Board of Immigration Appeals ("BIA") to reverse an Immigration Judge and require deportation. However, in reversing the BIA, the Ninth Circuit stated:

> First, we note that the BIA's conclusion that the "*LPP* assisted and participated in the persecution" of individuals misstates the requirements of deportability. In order to establish deportability under Section 1251(a)(19), the *individual* must be found to have participated or assisted the *organization* in persecutorial acts.

Laipenieks, 750 F.2d at 1435 (emphasis in original).

Thus, the Ninth Circuit, like the Second Circuit, rejected the group guilt analysis and focused the examination of whether an individual assisted in persecution on *that individual's* conduct. Moreover, the focus on the individual does not change even when a group to which the individual belongs is proven to have assisted in persecution.

We submit that the conflict is clear, that the issue is important and that it should be resolved.

CONCLUSION

The Seventh Circuit in *Schmidt* has gone beyond any other court in holding knowledge of or personal involvement in persecution is not necessary to revoke an individual's citizenship. The Court based this extension on its reading of *Fedorenko*. *Fedorenko*, however, did not so hold; indeed, the Supreme Court there required the focus to be on an individual's "particular conduct." This expansive reading of *Fedorenko* not only goes beyond the clear language and intent of *Fedorenko* but also creates a conflict between the Circuits in application of a critical part of the law of denaturalization.

Thus, for the reasons stated above, we respectfully request that the Supreme Court issue its writ.

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 90-1070

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MICHAEL SCHMIDT,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 88 C 9475—**Paul E. Plunkett,** *Judge.*

ARGUED SEPTEMBER 5, 1990—DECIDED JANUARY 30, 1991

Before BAUER, *Chief Judge*, WOOD, JR., *Circuit Judge*, and PELL, *Senior Circuit Judge.*

BAUER, *Chief Judge.* The constitution empowers Congress "[t]o establish an uniform Rule of Naturalization." Article I, sec. 8, cl. 4. Any alien who seeks to acquire the "precious right" of American citizenship must meet all the requirements fixed by Congress. *Schneiderman v. United States*, 320 U.S. 118, 122 & 131 (1943). One of the requirements Congress established for citizenship is entry into the United States by means of a legally procured immigration visa. Section 13 of the Displaced Persons Act of 1948, Pub. L. No. 80-774, ch. 647, 62 Stat. 1009, *as amended by* Pub. L. No. 81-555, ch. 262, 64 Stat. 219 (1950), provides that any individual who advocated or as-

sisted in the persecution of persons because of race, religion or national origin is ineligible to obtain a visa. In the judgment appealed from here, the district court revoked Michael Schmidt's citizenship and canceled his certificate of naturalization pursuant to 8 U.S.C. § 1451(a) of the Immigration and Nationality Act.[1] The district court found that because Schmidt served as an armed guard with the Nazi "Death's Head Battalion" at the Sachsenhausen concentration camp during World War II, he was ineligible to receive a visa. The court concluded that, because Schmidt's visa was invalid, he did not have lawful permission to enter the United States, and thus his subsequent naturalization was procured unlawfully under section 316(a)(1) of the Immigration and Naturalization Act. 8 U.S.C. § 1427(a)(1) (1982).[2] For the following reasons, we affirm.

I.

Michael Schmidt was born in Scharosch, Romania, of German parentage. In June, 1943, he was inducted into the German Army as a private and assigned to serve at

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[1] 18 U.S.C. § 1451(a) provides in pertinent part:

> (a) It shall be the duty of the United States attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 1421 of this title in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground that such order and certificate of naturalization *were illegally procured* or were procured by concealment of a material fact or by willful misrepresentation, and such revocation and setting aside of the order admitting such person to citizenship and such canceling of certificate of naturalization shall be effective as of the original date of the order and certificate, respectively. . . .

(Emphasis provided.)

[2] Section 316(a)(1) states in part that lawful admission to the United States is a prerequisite to naturalization.

the Sachsenhausen concentration camp near Oraneinburg, Germany. In the district court, the Government presented extensive evidence concerning the history of the Nazi regime and its plan to exterminate systematically individuals who disagreed with its policies, as well as groups it considered to be racially and socially inferior. The Nazis used concentration camps to carry out the Third Reich's plan to exterminate enemies or to exploit them through forced labor. The Gestapo, the Nazi secret police force, arrested and detained all persons thought to be enemies of the state. Those held in this manner could be incarcerated without trial for indefinite periods of time.

During Schmidt's service at Sachsenhausen, the camp was the second largest Nazi concentration camp after Auschwitz. Among those incarcerated there were Jews, Gypsies, Jehovah's Witnesses, certain Eastern European ethnics, political dissidents, homosexuals, and various individuals considered social "misfits," including beggars, vagrants, and the mentally ill. Each category of prisoner was forced to wear a colored triangle on the outside of its uniform: Jews, yellow; political prisoners, red; social misfits, black/brown; Jehovah's Witnesses, violet; homosexuals, pink. At the height of its operation, Sachsenhausen contained approximately 50,000 prisoners.

The "Death Head's Battalion"—the SS-Totenkopf Sturmbann—was organized as part of the armed SS[3] for the purpose of guarding Nazi concentration camps. The military command assigned Schmidt to guard prisoners on forced labor crews outside Sachsenhausen. His duties included escorting prisoners to and from work sites, counting prisoners before returning them to the concentration camp, and keeping prisoners in formation. Schmidt wore on his SS uniform the skull and crossbones insignia of the Death Head's Battalion. He carried a rifle and ammunition and had orders to shoot at prisoners who attempted to escape. Because concentration camp guards were not permitted

[3] *Die Schutzstaffel* ("SS") was the elite guard and intelligence unit of the Nazi Party.

to enter the camps themselves, Schmidt was confined to patrol outside the camp wall. Although there is no evidence that Schmidt personally killed prisoners, it has been documented that during the period he served at Sachsenhausen, two Jews were intentionally murdered and at least thirteen prisoners were executed by being shot through the nape of the neck.

In addition, tens of thousands died in Sachsenhausen as a result of starvation, exhaustion, beatings, exposure, disease, and medical experimentation. The grim history of Sachsenhausen has been well-documented by historians and tribunals that have tried Nazi war criminals. For example, the Government presented transcripts of German criminal proceedings against various individuals found guilty of committing atrocities at Sachsenhausen: camp leaders Hermann Sorge and August Hohn; barracks leader Wilhelm Karl Ferdinand; and medical doctors Heinz Baumkotter, Alois Gaberle, and Otto Adam. In addition, the Government presented the testimony of a historian, Charles W. Syndor, President of Emory and Henry College in Emory, Virginia, who has made a career of studying the Nazi regime and its concentration camps. Syndor's testimony catalogued the mass killings, subhuman living conditions, and bizarre medical experiments that occurred in Sachsenhausen and its environs. Finally, the Government submitted transcribed interrogations of Sachsenhausen guards and the testimony of camp survivors who witnessed beatings, killings, and indescribably cruel treatment of prisoners.

Schmidt continued to serve as an armed guard at Sachsenhausen until at least September, 1944. He then served in the Third Battalion of the 38th SS Armored Infantry Division, "Goetz von Berlichingen," and was wounded in combat in Lorraine, France on November 28, 1944. He remained in military hospitals until he became a British prisoner of war. He was released on July 8, 1946.

Schmidt made his way to the United States under the authority of the Displaced Persons Act of 1948 ("DPA").[4] Congress enacted the DPA to accommodate the large number of European refugees wishing to emigrate to the United States after World War II. A person seeking to obtain an immigration visa under the DPA was required to obtain a designation of "displaced person" status as defined by the Constitution of the International Refugee Organization of the United Nations ("IRO"). 62 Stat. 3037-55 (1946).[5] Annex I, Part II of the IRO Constitution provided that war criminals and others who "assisted the enemy in persecuting[6] civil populations of countries" were not "the concern" of the IRO. *Id.* at 3051-52. These individuals thus were excluded from the definition of "displaced persons" under the DPA.

After checking the applicant's background, a case analyst from the Displaced Persons Commission ("DPC") issued a report certifying that the applicant was a person eligible for admission into the United States. The analyst then forwarded the applicant's file to the appropriate American consulate. A vice-consul reviewed the visa application and other documents in the applicant's file, including the preliminary IRO certification and the DPC report. The vice-consul also interviewed the applicant and,

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[4] The amended version of the Act applied to individuals who, like Schmidt, entered the United States after its enactment.

[5] The IRO was founded in 1946 to provide services to the thousands of former prisoners of war and others dislocated by the war.

[6] As we indicated in *Schellong v. INS*, 805 F.2d 655, 660 (7th Cir. 1986), *cert. denied*, 481 U.S. 1004 (1987), a "substantial body of precedent" informs the definition of "persecution." The general standard is "the infliction of suffering or harm, under government sanction, upon persons who differ in a way regarded as offensive (*e.g.*, race, religion, political opinion, etc.), in a manner condemned by civilized governments." *Id.* at 662 (citing H.R. Rep. No. 95-1452, 95th Cong., 2d Sess. at 5 (1978), *reprinted in* 1978 U.S. Code Cong. & Admin. News 4700, at 4704).

if the applicant met the criteria of the DPA and other immigration laws, the vice-consul issued a visa.

After living in Germany and Austria for several years following the war, Schmidt applied for a determination from the DPC that he was a displaced person eligible to emigrate to the United States. On his application, Schmidt indicated to the DPC that he was conscripted into the "German Army, Waffen-SS 'Goetz von Berlichingen,' " but he did not indicate his service as a guard at Sachsenhausen. Based on Schmidt's representations in his questionnaire, on February 28, 1952, DPC case analyst John F. Zipf, Jr. certified Schmidt as a displaced person eligible for a visa. Paul B. Lanius, Jr., the American Vice-Consul in Salzburg, Austria, issued Schmidt a visa in April, 1952. Schmidt entered the United States pursuant to this visa on May 24, 1952.

On March 1, 1968, Schmidt filed an application to become a United States citizen. Question 7 of the application form required him to list "present and past membership in every organization, association, fund, foundation, party, club, society, or similar group in the United States and in any other place, and your foreign military service." Schmidt entered his military service in the German army from 1943 to 1945, but did not indicate that he had served as an armed guard at Sachsenhausen from June, 1943 to September, 1944. On April 2, 1968, the United States District Court for the Northern District of Illinois issued a certificate of naturalization granting Schmidt United States citizenship.

Schmidt lived a quiet life in the Chicago area, where he worked as a janitor until his retirement. Following a determination by the Criminal Division of the Office of Special Investigations of the United States Department of Justice that there was good cause to revoke Schmidt's citizenship, the Government filed a complaint in federal district court on November 2, 1988. The court ordered

Schmidt's citizenship revoked[7] and, in February, 1990, Schmidt surrendered his certificate of naturalization to the Attorney General of the United States. This appeal followed.

II.

At issue is whether, under section 13 of the Displaced Persons Act, Schmidt's service in the SS as a guard at Sachsenhausen concentration camp rendered him ineligible to obtain a visa, in that his activities constituted assistance in the persecution of persons because of race, religion or national origin. The district court believed it did, and granted summary judgment on that basis. Summary judgment is appropriate in denaturalization proceedings when there are no genuine issues of triable fact. *United States v. Dercacz*, 530 F. Supp. 1348, 1350-51 (E.D.N.Y. 1982). We review the matter *de novo* to determine whether the record as a whole establishes that the Government was entitled to judgment as a matter of law.

Citizenship is procured illegally any time the applicant has failed to comply with "all the congressionally imposed prerequisites to the acquisition of citizenship." *Fedorenko v. United States*, 449 U.S. 490, 506 (1981) (citing *Afroyim v. Rusk*, 387 U.S. 253, 267 n.23 (1967)). Section 316(a)(1) of

[7] The district court entered summary judgment on Count I of the complaint, which alleged that Schmidt was not eligible for a visa under section 13 of the DPA because of his service as an armed guard at a concentration camp. Accordingly, the district court did not reach issues presented by the other counts of the complaint: whether Schmidt was a member of a movement hostile to the United States or to the form of government of the United States (Count II), whether he voluntarily bore arms against the United States (Count III), whether he acquiesced in activities or conduct contrary to civilization and decency on behalf of the Axis countries (Count IV), whether he willfully made misrepresentations in his visa application (Count V), whether he possessed the requisite good moral character to obtain a visa (Counts VI and VII), and whether he willfully concealed his membership in organizations on his naturalization petition (Count VIII).

the Immigration and Naturalization Act of 1952, 8 U.S.C. § 1427, requires that the person seeking naturalization has been "lawfully admitted for permanent residence," that is, possess a valid visa. In denaturalization proceedings for illegal acquisition of citizenship, an individual's failure to enter the United States lawfully by means of a valid immigration visa, a condition precedent to naturalization, commands denaturalization. Further, section 13 of the DPA mandates that an individual is ineligible for a visa if a member of a specifically excluded category of persons: those who assisted in persecution. *See, e.g., United States v. Leprich*, 666 F. Supp. 967, 969 (E.D. Mich. 1987) ("[B]ecause Leprich was a concentration camp guard, he was ineligible for the visa he received and his citizenship was illegally procured.")

The district court granted summary judgment in favor of the Government on the ground that Schmidt had "in fact assisted in the persecution of persons because of their race, religion or national origin by serving as an armed guard at Sachsenhausen concentration camp." *United States v. Schmidt*, No. 88-C-9475, slip op. at 21 (N.D. Ill. January 3, 1990). Schmidt argues that the district court erred in several respects. The essence of his argument is that the court improperly focused upon his *status* as a member of the "Death Head's Battalion," rather than upon his *specific* conduct.

Schmidt first maintains that the court failed to consider that he involuntarily joined the SS. In *Fedorenko*, the Supreme Court stated that "[u]nder traditional principles of statutory construction, the deliberate omission of the word 'voluntary' from the DPA compels the conclusion that the statute made *all* who assisted in the persecution of civilians ineligible for visas." 449 U.S. at 512 (emphasis in original). The Court rejected the distinction between voluntary and involuntary service for DPA purposes, and held that service as an armed guard in a concentration camp constitutes assistance to the enemy under the DPA as a matter of law. *Id.* at 514. Therefore, Schmidt's involuntary service argument is meritless.

Schmidt also argues that he personally did not commit atrocities against the Sachsenhausen prisoners. He contends that because armed guards were not permitted to enter the camp, he had no knowledge of the persecution occurring within Sachsenhausen's walls. Whether or not Schmidt personally engaged in acts of violence, however, does not affect our conclusion that he assisted in persecution.[8] Concerned that concentration camp survivors might become ineligible for visas because of "assistance" they had provided to their Nazi captors in the death camps, the *Fedorenko* Court drew a continuum of conduct ranging from passive acceptance to active, personal participation. The Court distinguished between a person who only cut the hair of fellow inmates before they were killed and an armed guard who shot a fleeing inmate, finding that the former should not be found to have assisted in the persecution of civilians, but that the latter should. *Id.* at 512 n.34. It is more difficult to determine whether conduct falling elsewhere on the continuum may be considered persecution. The difficulty of the problem is magnified by the task of determining the contribution of a single individual to the collective wrongdoing of a nation or group.

Whatever close questions may be presented by the application of the *Fedorenko* continuum to other factual situations, it is clear that service as an armed concentration camp guard constitutes assisting in persecution under the DPA. In *Schellong v. INS*, 805 F.2d 655 (7th Cir. 1986), *cert. denied*, 481 U.S. 1004 (1987), we observed that

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[8] We note that although Schmidt's actual knowledge of the events occurring inside the walls of Sachsenhausen is unnecessary to a conclusion that he assisted in persecuting its inhabitants, his assertion that he was ignorant of the persecution is belied by the fact that he guarded concentration camp prisoners who wore color-coded patches to signify their racial, ethnic, social or political status. Further, Schmidt's primary job was to escort prisoners to and from forced labor sites. Some collapsed at work, and many later died from the combined effects of starvation and exhaustion.

"Nazi concentration camps were places of persecution; individuals who, armed with guns, held the prisoners captive and prodded them into forced labor with threats of death or capital punishment cannot deny that they aided the Nazis in their program of racial, political, and religious oppression." *Id.* at 661. When examined in context, the activities of an armed concentration guard must be viewed as contributing to the collective effort of the Nazis to persecute innocent civilians.

Indeed, the facts in Schmidt's case virtually are indistinguishable from those in *Kulle v. INS*, 825 F.2d 1188 (7th Cir. 1987), *cert. denied*, 484 U.S. 1042 (1988). Kulle also served in the Totenkopf Division of the Nazi Waffen SS. From 1942 to 1945, he was an armed guard at Gross-Rosen, a concentration camp in Silesia, now a part of Poland. Gross-Rosen was a forced labor camp, and Kulle, like Schmidt, worked along the perimeter of the camp. Kulle, like Schmidt, argued that he did not assist in persecuting prisoners "merely because he was present." *Id.* at 1192. Rejecting this argument, we indicated that, because the applicable statutory provision authorized deportation of anyone who "assisted" in persecution, "personal involvement in atrocities need not be proven." *Id.* Thus, we affirmed an order of Board of Immigration Appeals that Kulle be deported because he participated in persecution. Schmidt argues that *Kulle* is distinguishable because Kulle participated in the forced removal of concentration camp prisoners from Poland to Germany in mid-winter, while Schmidt guarded work parties. The distinction eludes us. Service as an armed guard equally ensured the systematic destruction of concentration camp inmates. *See also United States v. Kairys*, 782 F.2d 1374, 1378 (7th Cir. 1986) ("*Fedorenko* continues to stand for the proposition that service as an armed guard equals persecution.")

Thus, even if Schmidt personally did not participate in the brutal acts committed at Sachsenhausen, the fact of his armed, uniformed service is sufficient to establish that

he assisted in persecution.[9] In *United States v. Osidach*, 513 F. Supp. 51, 78-79 (E.D. Pa. 1981), *appeal dismissed on defendant's death*, No. 81-1956 (3rd Cir. 1981), the court concluded that an individual who served as an armed, uniformed member of the Ukrainian police during World War II was a participant in persecution for purposes of section 13 of the DPA. The *Osidach* court suggests, as does Schmidt, that mere membership in a group involved in persecution is insufficient to establish that an individual is a persecutor himself. *Id.* at 79. Even the *Osidach* court recognized, however, that armed, uniformed service on behalf of an occupying force constitutes a form of persecution:

> The mere presence of the watchful eye of the conqueror or his deputies, coupled with the often demonstrated presence of both the means and the inclination to persistently inflict various indignities, physical abuse, injuries or even death, without notice or reason, is the personification of mental persecution, to anyone, let alone innocent civilian men, women and children reduced to various degrees of substandard mental and physical well-being.

Id. at 99.

In light of these precedents, we conclude that Schmidt assisted in persecution of persons because of race, religion or national origin as contemplated by section 13 of the

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[9] Schmidt argues that summary judgment was inappropriate because intent to persecute was at issue. This argument misses the mark entirely, as, in cases of this type, intent is irrelevant. In *Dercacz*, 530 F. Supp. at 1351, the trial court granted summary judgment to the Government in a denaturalization proceeding involving a former Ukrainian police officer whose duties included bringing Jews to the local police station and reporting civilians who had sold food to Jews. The Nazis used the Ukrainian police to keep order in occupied territories. The court held that clear and convincing evidence of Dercacz's service in the Ukrainian police force left "no doubt" that he assisted the Nazis in persecuting Jews. Here, the uncontroverted fact of Schmidt's service as an armed guard at Sachsenhausen is clear and convincing evidence that he assisted the Nazis in persecuting civilians.

DPA. He carried a gun and wore the uniform of the dreaded "Death Head's Battalion". He guarded Jews, Gypsies, Jehovah's Witnesses, Eastern European nationals, and other persecuted peoples and forced them to do the bidding of the Third Reich. Schmidt prevented these prisoners from fleeing, and subjected them to forced labor under unspeakably brutal conditions. Such employment removed Schmidt from the intended scope of those to be aided by the DPA.

III.

In affirming the district court's revocation of Schmidt's citizenship, we are mindful of the fact that Schmidt has lived in the United States for many years, and that he has raised a family and established roots in this country. At the same time, we are mindful of the fact that Schmidt entered the United States on an invalid visa and acquired that "precious right" of citizenship unlawfully. When Congress enacted the DPA, it sought to help those who had been persecuted by the enemy because of their religious, nationalistic, and ethnic identities. By excluding those who "assisted in persecution" in section 13 of the DPA, Congress intended to prevent those who contributed to the Nazi persecution of innocent civilians from obtaining visas to enter the United States as refugees. It would defeat the paramount purpose of the DPA—to assist those whose lives had been disrupted by persecution—to extend the statute's benefits to the persecutors themselves.

As we held in *Kulle* and the Supreme Court held in *Fedorenko*, an armed guard at a Nazi concentration camp is not eligible for a visa under the Displaced Persons Act. Schmidt, therefore, was not eligible for the visa he obtained pursuant to the DPA. Because he did not fulfill all of the statutory requirements for naturalization, his citizenship was illegally procured. Accordingly, the district court's entry of summary judgment revoking his citizenship and canceling his certificate of naturalization was correct as a matter of law and is, therefore,

AFFIRMED.

PELL, *Senior Circuit Judge*, dissenting. This case involves the cancellation of what the majority correctly terms the "precious right" of citizenship. Because I do not believe the resolution of that issue in this case by summary judgment was appropriate, I respectfully dissent.

There is substantial reference in the record of this case to the depths of depravity to which the Third Reich descended. No one disputes that now. The question before this court, however, in a sense, is the extent, if any, that Schmidt was smeared by the evil brush of the governmental activities inside Sachsenhausen.

The record is, of course, sparse because this case is here without a trial. But there is no evidence that this defendant participated in any wrongful act toward any prisoner; there is affirmative evidence that he was never inside Sachsenhausen prison camp; there is affirmative evidence that he was a work-party guard and that he obeyed the regulation which forbade mistreatment of prisoners on work parties; and there is affirmative evidence that his service to the Third Reich of Germany, not his native country, in World War II was hardly "voluntary." It was, accepting all of this, the district court's judgment that a violation was shown solely on the basis of participation as a guard outside the walls of the camp.

It may well be that summary judgment can be appropriate in a denaturalization case involving a claimed defective entry visa under the Displaced Persons Act. The majority opinion so states when there are no genuine issues of triable fact, citing *United States v. Dercacz*, 530 F. Supp. 1348, 1350-51 (E.D.N.Y. 1982). In that case, however, Dercacz testified himself to the effect that he had assisted in persecution.

In the case before us, the only straw that would appear to seem to suggest Schmidt had some idea that some of the work prisoners were persecuted because of beliefs would be found in that he knew from their triangles that they were homosexuals. But, as his counsel pointed out, homosexuals were jailed in some of the states of this country at that very period of time.

The district court in its ruling found it did not make any difference whether Schmidt had knowledge or not. I disagree. As a matter of what was involved in the Displaced Persons Act, I cannot conceive how a person can be rendering assistance in persecution without some showable knowledge, or at the very least evidence of facts known to him which could lead only to a conclusion that the work prisoners were being persecuted. Schmidt, in my opinion, as a citizen was entitled to a trial on the issue of knowledge.

Cases interpreting *Fedorenko v. United States*, 449 U.S. 490 (1981), hold (while finding) that "in order to establish 'participation' or 'assistance' the act of participation must involve some personal activity involving persecution." *United States v. Osidach*, 513 F. Supp. 51, 72 (E.D.Pa. 1981). The Ninth Circuit reads "assist" in these words:

> personal active assistance or participation in persecutorial acts. . . ." (*Laipenieks v. INS*, 750 F.2d 1427, 1432 (9th Cir. 1985).

Fedorenko does not hold otherwise; in both examples given (the barber and the guard who shoots) knowledge is presumed, unlike the present case in which there is no factual basis supporting knowledge. The court's holding was based simply on the fact that the haircutting did not rise to the level of "assistance in persecution." *Fedorenko* is not a case holding that "knowledge" is not an element of "assistance." *Fedorenko v. United States*, 449 U.S. at 512, note 34. *Kungys v. United States*, 485 U.S. 759, 767 (1988).

It is true that this concept of "assistance" is not "capable of a precise definition" (*United States v. Sprogis*, 763 F.2d 115, 121 (2d Cir. 1985)), but it is also true that the "facts and the law should be construed as far as is reasonably possible in favor of the citizen. . . ." *Schneiderman v. United States*, 320 U.S. 118, 122 (1943).

The Government relied on *Kulle v. INS*, 825 F.2d 1188 (7th Cir. 1987) as holding that there is no requirement of "knowledge" for "assisting."

Sergeant Kulle was deported on a record that included this question and answer (825 F.2d at 1195):

> Q. Okay, was it your understanding at the time you made these lies, that if you had told the truth about your SS service you would have been denied admission to the United States?
>
> A. That's correct.

Kulle had denied SS service. Schmidt put it on his application. Kulle was decorated with the Iron Cross (825 F.2d at 1190); Schmidt's service record shows nothing except that he came and went as a private, with no decorations. Kulle was a training leader, Schmidt was not. Kulle participated in a forced evacuation from a camp in the East to Mauthausen. Schmidt did not. The Court distinguished a "deportation" case from a denaturalization case (such as Schmidt's) (825 F.2d at 1193), and, with Kulle's admitted lies, ordered him deported.

As in *Schellong v. INS*, 805 F.2d 655 (7th Cir. 1986), this court held that *Kulle* (on a trial record) had enough knowledge to be found to have assisted in persecution. In the present case, the facts in the record developed thus far did not reach the point of establishing knowledge on the part of Schmidt. In *Kulle*, a judgment was made on the basis of an INS record after a hearing at which Kulle's attorney was granted cross examination. Schmidt is to lose his citizenship without a fact hearing.

It may be at a trial, the trier of fact, evaluating the credibility of witnesses, might conclude that it is incredible that Schmidt during the relatively short period he was an outside guard could not help being aware that he was assisting in persecution. But that is a matter of credibility. Schmidt did not have such a chance. One might now think it is incredible that a presumably intelligent airline pilot could believe in good faith that the Internal Revenue Act is unconstitutional. *Cheek v. United States*, 59 U.S.L.W. 4049 (Jan. 8, 1991). He, however, was entitled to a fair trial and so should Schmidt be. Our system

of justice that guilt should not be predicated on anything less than a fair trial is too important to tolerate any deviation or diminution.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT—WITH ORAL ARGUMENT

Date: January 30, 1991

BEFORE:
Honorable William J. Bauer, Chief Judge
Honorable Harlington Wood, Jr., Circuit Judge
Honorable Wilbur F. Pell, Jr., Senior Circuit Judge

No. 90-1070

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

MICHAEL SCHMIDT,

Defendant-Appellant

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 88 C 9475, Judge Paul E. Plunkett

This cause was heard on the record from the above mentioned district court, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

APPENDIX C

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

June 4, 1991.

Before

Hon. WILLIAM J. BAUER, *Chief Judge*
Hon. HARLINGTON WOOD, JR., *Circuit Judge*
Hon. WILBUR F. PELL, JR., *Senior Circuit Judge*

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 90-1070 vs.

MICHAEL SCHMIDT,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 88 C 9475—Paul E. Plunkett, *Judge.*

ORDER

On consideration of the petition for rehearing with suggestion for rehearing en banc filed in the above-entitled matter by Defendant-Appellant Michael Schmidt, no judge in active service has requested a vote thereon, and a

majority* of the judges on the original panel have voted to deny the petition for rehearing. Accordingly,

IT IS HEREBY ORDERED that the aforesaid petition for rehearing be, and the same is, DENIED.

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* The Honorable Wilbur F. Pell, Senior Circuit Judge, voted to grant a rehearing.

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JUDGMENT IN A CIVIL CASE

UNITED STATES OF AMERICA

v. Case Number: 88 C 9475

MICHAEL SCHMIDT

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that summary judgment is granted to the United States on Count I. Defendant's citizenship is revoked, his Certificate of Naturalization is cancelled, and defendant Michael Schmidt is ordered to surrender and deliver the Certificate of Naturalization to the Attorney General.

Date January 3, 1990

H. STUART CUNNINGHAM
Clerk

/s/ Theresa B. Kinney
(By) Deputy Clerk

APPENDIX E

[DATED JANUARY 3, 1990]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	No. 88 C 9475
v.	)	
	)	Hon.
MICHAEL SCHMIDT,	)	Paul E. Plunkett
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

In 1952, Defendant, Michael Schmidt, was granted a visa to immigrate to the United States from Austria under the Displaced Persons Act (DPA). In 1968, after residing in the United States for almost sixteen years, Michael Schmidt applied for and was granted United States citizenship. The United States now seeks to revoke Schmidt's certificate of naturalization and denaturalize him because during World War II he served as a guard at Sachsenhausen concentration camp and because he failed to reveal this fact in applying for his visa and for citizenship.

The United States has moved for summary judgment on several counts of the amended complaint. Judgment for the government on any count will result in Schmidt's denaturalization. Count I seeks denaturalization on the ground that Defendant was not eligible for a visa under

the DPA because of his service as an armed guard at a concentration camp. The DPA prohibits the issuance of visas under the DPA to persons who assisted in the persecution of any person because of race, religion, or national origin. DPA § 13. One who is ineligible for a visa cannot be lawfully admitted into the United States and therefore cannot be lawfully naturalized under 8 U.S.C. § 1427(a)(1). Count II alleges Schmidt did not lawfully become a citizen because his visa was unlawfully procured under DPA § 13, which prohibits issuance of a visa to one who is or has been a member of a movement hostile to the United States or to the form of government of the United States. The government argues that Schmidt's membership in the SS Totenkopf Sturmbanne (SS Death's Head battalion) as a concentration camp guard constituted membership in a movement hostile to the United States. Count III alleges that Defendant voluntarily joined the Waffen-SS, making him ineligible for a visa under DPA § 13, which provides that no visas shall be issued to persons voluntarily bearing arms against the United States in World War II. Count IV seeks denaturalization because Defendant's service as an armed concentration camp guard constitutes acquiescence in activities or conduct contrary to civilization and human decency on behalf of the Axis countries. State Department regulation 22 C.F.R. §§ 53.32-53.33 forbids the issuance of a visa to any alien acquiescing in such activities or conduct. Count V alleges that Schmidt unlawfully procured his citizenship by willfully misrepresenting that he had not participated in any movement hostile to the United States for the purpose of gaining admission to the United States, in violation of DPA § 10. Count VI alleges illegal procurement of citizenship under 8 U.S.C. § 1427(a)(3), which requires that a person may not be naturalized unless he has been a person of good moral character. The government alleges that Schmidt

is not of good moral character as evidenced by his activities in the SS. Count VII seeks denaturalization for lack of good moral character, alleging Defendant gave false testimony to obtain admittance and citizenship. Count VIII seeks revocation of citizenship on the ground that Schmidt willfully concealed his membership in organizations on his naturalization petition. All eight counts seek the same relief: a declaration that Schmidt illegally procured his citizenship; revocation of his citizenship; cancellation of his Certificate of Naturalization; judgment restraining Schmidt from claiming any rights of United States citizenship; and the surrender of Schmidt's Certificate of Naturalization.

The government seeks summary judgment on Counts I, IV, V, and VI. We grant summary judgment on Count I and revoke Schmidt's citizenship, because the evidence is undisputed that Schmidt served in the SS as a guard at Sachsenhausen concentration camp and that, under the DPA, this service rendered him ineligible for a visa. We find that the law is clear that under these circumstances, Schmidt was not entitled to a visa under the DPA, and his activities constituted acquiescence and assistance in the persecution of persons because of race, religion or national origin. We do not reach the issue of whether there is a genuine dispute as to any material facts with respect to whether Schmidt willfully made misrepresentations as alleged in Counts V and VI, nor do we rule on whether Schmidt's actions constitute acquiescence in activities or conduct contrary to civilization and human decency, as these are not necessary to our ruling that Schmidt unlawfully procured his citizenship. We enter final judgment in favor of the government, granting all the relief requested, and note that we believe that this order is final and appealable.

Facts

Although Schmidt does not at this time dispute that he served as a prison guard as Sachsenhausen concentration camp and was a member of the SS Death's Head battalion for approximately one year between summer, 1943 and fall, 1944, we discuss at length the evidence presented by the government. This evidence shows that the Michael Schmidt who is a defendant in the action before us is the same Michael Schmidt referred to in these documents: he was born in the same place and on the same date as described therein, to a father named Johann, and he suffered an injury to his left arm in battle. The government's evidence also shows that Sachsenhausen was a concentration camp at which prisoners were routinely mistreated; they were starved, overworked, beaten, experimented upon and killed.

Defendant does not directly dispute any of the evidence presented below, nor does he present any evidence of his own to contradict it. He argues that there are factual disputes as to whether he assisted in persecuting anyone because of race, religion or national origin, since he was unaware of why prisoners were incarcerated at Sachsenhausen. He notes that there is evidence that criminals and some SS guards were housed at Sachsenhausen and that it was not an extermination camp. He further argues that the evidence shows that he never harmed anyone and never fired his weapon and that he saw no one else harm a prisoner. Therefore, he argues that it is a disputed fact whether he assisted or acquiesced in the persecution of any person because of race, religion, or national origin. He also alleges that there is a dispute as to whether he ever made any material misrepresentations on his visa application, noting he revealed his service in the SS. He argues that there are disputes as to whether there were misrepresen-

tations, whether the alleged misrepresentations were material, and whether the government actually knew of his concentration camp service. Schmidt further argues that the government should be prevented from prosecuting this action against him by laches and estoppel.

1. *Evidence Concerning Schmidt*

Exhibit 1.1 contains a translation of medical records from the Reserve Military Hospital in Bergen-Schwarmstedt for Michael Schmidt, born March 4, 1923 in Romania, whose father was Johann Schmidt. Michael Schmidt entered German military service on June 23, 1943 and served in the SS Death's Head Battalion in Oranienberg. These records indicate the subject has an arm wound on either his right or left side from a bullet and grenade splinter.

Exhibit 1.2 is a Concentration Camp Service Card for Michael Schmidt. It states that he was inducted on June 23, 1943 into the Waffen SS as a private and served at the concentration camp in Sachsenhausen in the SS Death's Head Guard Battalion until September 19, 1944, when he was transferred to combat.

Schmidt stated in his deposition that he was born on March 4, 1983 [sic], in Romania and his father's name was Johann. Exhibit 1.3 at 8-9. When asked about his health throughout his life he indicated an injury from the war on his left upper arm. *Id.* at 19-20, 179. He admitted serving in the SS. *Id.* at 27. He said that a friend signed him up for the Waffen SS at some rally. *Id.* at 35, 38-40. He was drafted into German military duty and inducted on June 20, 1943. *Id.* at 35. He initially was called by the Romanian army, but believes there was an agreement with the German government and the German Army took over. *Id.* at 44, 47.

The government disputes this claim and has presented evidence that Defendant's enlistment was voluntary. The agreement between Germany and Romania concerning military service, signed 12 May 1943, allowed ethnic Germans who were Romanian citizens to volunteer for service in the Waffen-SS instead of being drafted into the Romanian military forces. The agreement provided that to do so, ethnic German Romanian citizens had to sign a form stating that their enlistment in the German forces was voluntary. Exhibit 3.31; Exhibit 9.4 at 43-44.

Schmidt further testified that he wore a Waffen SS uniform, with a Totenkopf Death's Head symbol and was first assigned to Oranienberg. *Id.* at 42, 66. He was tattooed after a few months and assigned to barracks in Oranienberg in Sachsenhausen, just across the street from the concentration camp. *Id.* at 54, 82. He spent some time being trained and then was gradually assigned the duties of a guard. *Id.* at 72-73.

As a guard, he took prisoners from the camp to work outside the camp, guarded them as they worked and brought them back at night, carrying a rifle and wearing a uniform. *Id.* at 74-76, 120-121. His orders were to holler at any prisoner trying to escape, to fire a warning shot and then to shoot him. *Id.* at 122-123. A few times he also guarded around the camp, outside the main wall, to prevent prisoners from escaping over the wall. *Id.* at 84. He received pay and could leave the barracks at certain times. *Id.* at 77. He never fired his weapon other than at training. *Id.* at 79.

Schmidt testified that he was aware that there were gay prisoners at the camp and that they wore triangles, which he believed were purple. *Id.* at 153. He claimed his unit at the camp was Waffen SS, Goetz von Berlichingen. *Id.* at 159. He never heard during the war about

the Totenkopf unit and was not aware that he was a member of it. *Id.* at 209. He denied receiving any training in Nazi political ideas, and stated that they were told nothing about the prisoners or why they were at the camp, and were forbidden to talk with them. *Id.* at 164.

Schmidt testified that when he applied to come to the United States, he told the authorities that he was in the SS, but they did not ask him whether he had worked as a guard at a concentration camp and so he did not tell them that he had. *Id.* at 199-200. He never told anyone that he was a guard at Sachsenhausen concentration camp. *Id.* at 204. He said that no one asked him that and there was no form requesting that information. *Id.* at 208. He never told any United States official that he was not a guard at a concentration camp. *Id.* at 217. An affidavit he signed for immigration purposes stated, "I have never advocated or assisted in the persecution of any person because of race, religion or national origin." When asked whether, by serving as a guard at a concentration camp, he had assisted in persecution, he responded, "Not I know. I was put to stand guard. I don't had nothing to do with nobody. I was put there not by choice." *Id.* at 220.

2. *Evidence Concerning Sachsenhausen*

The government has presented substantial evidence showing that atrocities were committed at Sachsenhausen. First, they present the transcripts of the State Court of Bonn's judgment in the criminal proceedings against Hermann Sorge, a camp leader, and Wilhelm Karl Ferdinand, a barracks leader, at Sachsenhausen, *see* Exhibit 2.1; the State Court of Dusseldorf's judgment in criminal proceedings against August Hohn, a camp leader at Sachsenhausen, *see* Exhibit 2.2; and the State Court of Munster's

judgment in the criminal proceedings against Dr. Heinz Baumkotter, chief medical doctor of Sachsenhausen from 1943-1945, and Dr. Alois Gaberle and Dr. Otto Adam. *See* Exhibit 2.3. In addition, there are two exhibits presenting interrogation testimony of guards at Sachsenhausen. Exhibit 4.1 contains a transcribed interrogation of Gustav Wegner, commander of the guard battalion of the Death's Head ("Totenkopf") SS Division in the Sachsenhausen concentration camp from 1941 until August, 1944. Exhibit 4.2 contains the transcribed interrogation of Leopold Schweitzer, a Sachsenhausen guard.

The government also presents, as Exhibit 9.4, the testimony of Charles W. Syndor, President of Emory and Henry College in Emory, Virginia, whose doctoral dissertation in history is entitled, "Totenkopf: A History of the SS Death's Head Division." Dr. Syndor states that his professional career has been spent studying and teaching German history, particularly during the Nazi period. Exhibit 9.4 at 1-2. He has written a book on the Death's Head Division and has been qualified as an expert witness in the field of German history, particularly with respect to the Nazis and the concentration camps, by four courts, including the Northern District of Illinois (*United States v. Schellong*, 547 F. Supp. 569 (N.D. Ill. 1982)). Exhibit 9.4 at 2-4. These exhibits contain extensive discussions of the circumstances at Sachsenhausen concentration camp.

With respect to the Sachsenhausen concentration camp, Dr. Syndor states that beginning in 1936, the SS concentration camp guards received the designation "SS Totenkopfverbande," which means SS Death's Head Formations. Exhibit 9.4 at 14. Various Death's Head battalions served at Sachsenhausen, sometimes under slightly different designations, performing the same duties and assign-

ments. Exhibit 9.4 at 35. The camp was guarded by about 2000 SS soldiers. Exhibit 4.1 at 6. The duties were the guarding of the camp, escorting prisoners to and from work and guarding them at the worksite, and escorting transports of prisoners. Exhibit 9.4 at 36. Guards had standing orders to shoot to kill immediately upon any attempt by a prisoner to escape. Exhibit 4.1 at 7; Exhibit 9.4 at 36. At the worksite, guards were to shoot, after one warning, any prisoner who crossed the boundary of the sentry chain. Exhibit 9.4 at 39.

The camp, which was severely overcrowded, housed, among others, Jehovah's Witnesses, homosexuals and Jews. Exhibit 2.1 at 36; Exhibit 4.1 at 3. These persons were subjected to particularly brutal treatment and most of the Jehovah's Witnesses and homosexuals there perished. Exhibit 9.4 at 47. Starting in 1938, asocials were transported to the camp, including beggars, hobos, Gypsies, work shirkers and petty criminals. Exhibit 2.1 at 57; Exhibit 9.4 at 47. Beginning in 1941, parts of the camp housed large numbers of Soviet prisoners of war. Exhibit 2.1 at 37; Exhibit 9.4 at 46. Most of the Jews from Sachsenhausen were transferred to Auschwitz in October 1942. Exhibit 2.1 at 56. However, some remained during the period when Defendant worked there as a guard. Exhibit 9.4 at 49. Two Jews were killed at the camp while defendant was there in May 1944. Exhibit 9.4 at 49. Many aliens, including Czechs, Poles and Belgians, were sent to the camp. Exhibit 2.1 at 59-60; Exhibit 4.1 at 3. Also incarcerated there were SS and SA members who displayed behavior harmful to the party or who had committed crimes. Exhibit 2.3 at 30, 86.

Prisoners wore colored triangular patches assigning them to various categories: red for political prisoners, yellow for Jews, pink for homosexuals, violet for Jehovah's

Witnesses, etc. Exhibit 2.1 at 60; Exhibit 2.2 at 14; Exhibit 9.4 at 48. Prisoners were widely mistreated. "Upon being brought in, the prisoners as a rule were given 25 blows with the cane." Exhibit 2.1 at 36. They were repeatedly mistreated from the time they arrived at the camp, by beating, kicking, and other forms of physical abuse. Exhibit 2.1 at 62, 70; Exhibit 4.2 at 2-3; Exhibit 9.6 at 4. Whipping was a commonly used form of punishment. Exhibit 9.4 at 51. Prisoners were made to perform very heavy labor and were poorly fed. Exhibit 9.4 at 53.

Tens of thousands died at Sachsenhausen. Exhibit 9.4 at 53. The death rate among new arrivals at the camp was particularly high. Exhibit 2.1 at 64. Many collapsed at work or at roll calls. Exhibit 2.1 at 67-68. Punishments for misbehavior were brutal and often resulted in death. Exhibit 2.1 at 78-82. Several prisoners were hanged in front of the assembled prisoner population. Exhibit 2.2 at 18-41. One prisoner was hanged for cutting leather strips from an old bag and nailing them under the soles of his wooden clogs to facilitate walking in the snow. Exhibit 2.2 at 35-36; Exhibit 9.4 at 57. Others were shot by guards. Exhibit 4.1 at 8-9. Further, many prisoners were subjected to medical experimentation. Exhibit 2.3 at 11-12, 58, 60-64, 102-103; Exhibit 9.4 at 54-55. Eventually, mass killings took place at the camp. In 1942, a crematorium was built at the camp. Exhibit 2.2 at 46; Exhibit 9.4 at 30. By 1943, Sachsenhausen was the second largest concentration camp, after Auschwitz. Exhibit 9.4 at 46.

From late fall 1943 to early 1945 many groups were transferred to Sachsenhausen to be killed. Certain groups were delivered to the camp solely for "purposes of liquidation." Exhibit 2.1 at 74; Exhibit 2.2 at 49-50. These groups included Jews, Czechs, and Poles. Exhibit 2.1 at 74-75. Some were brought directly to the crematorium building and executed using a variety of techniques in-

cluding gas administered in shower facilities, and shooting through the nape of the neck. Exhibit 2.2 at 50-65; Exhibit 9.4 at 56, 59. At least thirteen people were executed in the nape-shot facility during the period when Defendant was a guard at Sachsenhausen. Exhibit 9.4 at 59. Others were housed in extremely overcrowded facilities and subjected to complete physical destruction by being forced to keep in constant motion while being beaten and kicked. Some were forced to run in the snow naked, or asphyxiated in air-tight locked broom closets crowded with other prisoners. Exhibit 2.1 at 75-76.

Finally, the government presented the testimony of three survivors of Sachsenhausen. Joseph Oppenheimer was incarcerated at Sachsenhausen from August 1944 until the end of the war. Exhibit 9.6 (Affidavit of Joseph Oppenheimer) at 2. He and other prisoners were put to work defusing unexploded bombs. SS guards watched them from several blocks away, safe from any explosions. Several prisoners were killed when some of the bombs detonated. Exhibit 9.6 at 2. He stated that prisoners died of starvation on a daily basis at the camp. Exhibit 9.6 at 3.

Hans Walter was also imprisoned at Sachsenhausen, beginning in January, 1944. Exhibit 9.7 (Affidavit of Hans Walter) at 1. He lived in unheated barracks. Exhibit 9.7 at 2. He saw inmates whipped for speaking in Hebrew or for saluting guards incorrectly. Exhibit 9.7 at 2. He also saw several prisoners beaten to death. Exhibit 9.7 at 2-3.

Leon Messer was incarcerated at Sachsenhausen beginning around December 1942. He observed that most of the prisoners were starving. Exhibit 9.8 (Affidavit of Leon Messer) at 3. He witnessed many prisoner deaths, including several by hanging. Prisoners were regularly beaten. Exhibit 9.8 at 4.

3. Evidence Concerning Schmidt's Immigration

The government presented numerous pieces of evidence showing that if Schmidt's service as a guard had been known, he would not have been permitted to immigrate to the United States. The report of investigation of the displaced persons screening project contains Schmidt's statement that his military service consisted of service in the SS Panzer Inf. Div., Goetz v. Berlichingen, as a private. Exhibit 6.4 at 6, 40. It also contains a notation of May 17, 1951, that a Martin Braun stated during interrogation that one Michael Schmidt, SS Rottenfuehrer, is listed as a guard on a death march from Vienna to Mauthausen. Exhibit 6.4 at 37. This notation, according to the government, refers to a Michael Schmidt other than the Defendant herein. The government states that Defendant does not dispute that a different Michael Schmidt is referred to in Exhibit 6.4. Government's Reply Brief at 16-17.

John Zipf states that he was a case analyst for the Displaced Persons Commission ("DPC") and served in that capacity in Linz, Austria, from February to June, 1952. Exhibit 9.2 at 1. He reviewed displaced persons applications to determine their eligibility, including Michael Schmidt's. Exhibit 9.2 at 1, 3. He states,

> If, during the course of reviewing an application under the amended DP Act [Displaced Persons Act], I had learned that the applicant had served as an armed guard at a Nazi concentration camp during World War II, I would have recommended rejection of the application. One reason for the rejection would have been Section 13 of the amended DP Act. One exclusionary clause in Section 13 required rejection of an applicant who assisted in the persecution of any person because of race, religion or national origin. It would not have affected my determination to recommend rejection of an application for a visa under the

> DP Act if I had determined that the applicant involuntarily served as a guard at a Nazi concentration camp or that the applicant did not directly inflict any injury or killed any person confined at the Nazi camp.
>
> If the applicant stated on his application that in 1943 he was conscripted into the "German Army, Waffen SS, Goetz von Berlichingen" serving until 1944 at which time he was wounded and hospitalized until 1945 and it was later learned that he had, in fact, served as an armed SS guard at the Sachsenhausen Concentration Camp in Germany between 1943 and September, 1944, his application would have been rejected under Section 10 of the amended DP Act because of his misrepresentation. Section 10 excluded applicants who willfully made misrepresentations for the purpose of gaining admission into the United States.

Exhibit 9.2 at 2-3.

Paul Lanius, who was a United States Vice Consul at Salzburg, Austria from May 1951 to May 1952 with responsibility for determining the eligibility of persons for visas under the DP Act, stated under oath in his affidavit that he received the DPC reports on applicants for such visas and interviewed the applicants. He would go over all the information in an application and require the applicant to swear to the truth of the information and sign the application. Exhibit 9.3 at 1-3. He signed Michael Schmidt's visa application. Exhibit 9.3 at 4. He states

> If, in the course of reviewing Schmidt's application for a United States visa, in 1952, I had learned he had served as a guard at a Nazi concentration camp during World War II, I would have rejected his application. One reason for the rejection would have been Section 13 of the amended DP Act. One exclusionary clause in Section 13 required rejection of an applicant who assisted in the persecution of any person because of race, religion or national origin. It

> would not have affected my determination to reject an application for a visa under the DP Act if I had determined that the applicant involuntarily served as a guard at a Nazi concentration camp or that the applicant did not directly inflict any injury or killed any prisoner confined at a Nazi concentration camp.
>
> If the applicant stated in his application that during the period between 1943 and 1945 he had resided in the German Army and it was later learned that he had resided at the Sachsenhausēn Concentration Camp as a member of a guard unit between June 1943 and September 1944, his application would have been rejected under Section 10 of the DP Act because of his misrepresentation. Section 10 excluded applicants who willfully made misrepresentations for the purpose of gaining admission into the United States.

Exhibit 9.3 at 4-5.

Lee Reinfeld states that he is an employee of the United States Immigration and Naturalization Service (INS) and has so been since 1962. Exhibit 9.5 at 1. His job is to examine applicants for citizenship and recommend whether or not they should be admitted. Exhibit 9.5 at 2. He examined Michael Schmidt's Petition for Naturalization and signed it. Exhibit 9.5 at 5. He states that an applicant who served as an armed SS guard at a Nazi concentration camp could not have been lawfully admitted to the U.S. under the DP Act and would be ineligible for citizenship. Exhibit 9.5 at 5.

Analysis

Count I

The government carries a heavy burden of proof in a denaturalization case. The evidence justifying revocation of citizenship must be clear, unequivocal, and convincing.

Fedorenko v. United States, 449 U.S. 490, 505 (1981). However, summary judgment may be granted in a denaturalization proceeding where no genuine triable issues of fact exist. *See United States v. Dercacz*, 530 F Supp. 1348, 1351 (E.D.N.Y. 1982).

In *Federenko*, the Supreme Court interpreted the relevant provisions of the DPA and held, "The plain language of the [Displaced Persons] Act mandates . . . [that] an individual's service as a concentration camp armed guard—whether voluntary or involuntary—made him ineligible for a visa." 449 U.S. at 512. In *Federenko*, the defendant had gained a visa under the DPA by concealing the fact that he had served as an armed guard at the Nazi concentration camp at Treblinka. As in Schmidt's case, there was testimony by government witnesses that petitioner would have been denied a visa if the government had known he was an armed camp guard, regardless of whether he served voluntarily and regardless of whether he personally committed any atrocities against inmates. *Federenko*, 449 U.S. at 499-500.

Federenko served as a guard at Treblinka, which, unlike Sachsenhausen, was a death camp where people were brought solely to be killed. We do not find this distinction relevant, however, since it is clear from the evidence above that numerous atrocities were committed at Sachsenhausen. *See, e.g., Kulle v. I.N.S.*, 825 F.2d 1188, 1192-1193 (7th Cir. 1987), *cert. denied*, 484 U.S. 1042 (1988) ("none of these distinctions [between death camps and concentration camps of forced labor] makes a difference"); *United States v. Kairys*, 782 F.2d 1374, 1378 (7th Cir.), *cert. denied*, 476 U.S. 1153 (1986) ("we find nothing significant to distinguish armed guard service at a labor camp from such service at a concentration camp"). Federenko, like Schmidt, carried a gun, was paid, wore a uni-

form, was allowed to leave the camp, and denied participation in any atrocities. However, unlike with respect to Schmidt, others testified that Federenko had in fact committed acts of violence against prisoners, and Federenko testified that, upon orders, he had once shot in the direction of fleeing prisoners and that he was aware that Jewish inmates were being killed. *Federenko*, 449 U.S. at 494, 498, 500. Nevertheless, the Supreme Court held that it was not relevant whether Federenko had ever injured a prisoner or whether his service was voluntary. *See also Kulle*, 825 F.2d at 1192; *Schellong v. I.N.S.*, 805 F.2d 655, 657 (7th Cir. 1986), *cert. denied*, 481 U.S. 1004 (1987); *Kairys*, 782 F.2d at 1378 (no evidence of personal involvement in any atrocities necessary). The DPA requires only that an individual assist in the persecution of persons because of race, religion or national origin to be denied a visa. "[T]here can be no question that a guard who was issued a uniform and armed with a rifle and a pistol, who was paid a stipend and was regularly allowed to leave the concentration camp to visit a nearby village, and who admitted to shooting at escaping inmates on orders from the commandant of the camp, fits within the statutory language about persons who assisted in the persecution of civilians." *Federenko*, 449 U.S. at 512, n. 34.

Based upon the above, it is irrelevant whether Schmidt voluntarily joined the SS and whether he ever personally committed any atrocities. It is clear that his guarding of prisoners at Sachsenhausen by carrying a gun, preventing them from fleeing and forcing them to engage in forced labor, constituted assistance in the persecution of civilians, which rendered him ineligible for a visa under the DPA. *See United States v. Kairys*, 600 F. Supp. 1254, 1271 (N.D. Ill. 1984), *affirmed*, 782 F.2d 1374 (7th Cir. 1986) (armed guard at concentration camp is not eligible for a

visa under DPA and cannot lawfully procure citizenship); *Dercacz*, 530 F. Supp. at 1351-1352 (same). "Nazi concentration camps were places of persecution; individuals who, armed with guns, held the prisoners captive and prodded them into forced labor with threats of death or capital punishment cannot deny that they aided the Nazis in their program of racial, political, and religious oppression." *Schellong*, 805 F.2d at 661.

Schmidt also argues that his case is different from that of Federenko because he did not know that he was assisting in committing atrocities. Schmidt admits, however, that he was aware that the prison housed homosexuals, and there is undisputed evidence that prisoners wore patches denoting their status (Jew, homosexual, Jehovah's Witness, etc.). Claims by prison guards that they were unaware of the persecution and believed that the prisoners were there because they had broken German law have been rejected by the Seventh Circuit as "incredible." *See Schellong*, 805 F.2d at 661.

Regardless, we need not determine whether Schmidt knew his actions assisted the Nazis to commit atrocities. Schmidt clearly knew that he was preventing prisoners from escaping and forcing them to work, by guarding them with a gun. Whether he knew that they were unjustly imprisoned, that their living conditions were atrocious, or that other guards physically abused them, is irrelevant. The DPA does not require that Schmidt's assistance was voluntary or "knowing" in the sense that he understood fully the system he was helping to preserve and function. The DPA, like Section 241(a)(19) of the Immigration and Nationality Act, 8 U.S.C. § 1251(a)(19), is concerned with those who "assisted . . . in the persecution of any person because of race, religion, [or] national origin. . . ." The Seventh Circuit has held that under

§ 241(a)(19), assistance in persecution is to be viewed very broadly. No proof of actual knowledge need be presented. *Kulle*, 825 F.2d at 1193.

Therefore, we hold that no proof that Schmidt knew precisely what was going on within the camp is necessary to find that he assisted in the persecution that was in fact occurring. We hold that the government is entitled to summary judgment on Count I, which seeks denaturalization on the ground that Schmidt was not lawfully admitted into the United States because he in fact assisted in the persecution of persons because of their race, religion or national origin by serving as an armed guard at Sachsenhausen concentration camp.

Defenses

Defendant argues that the government should be barred by laches and estopped from pursuing this action. He argues that the presence in the government's files of the notation that one Michael Schmidt is listed as a guard on a death march from Vienna to Mauthausen, Exhibit 6.4, shows that the government knew at the time of Schmidt's application for a visa that he might have been a guard at a concentration camp. Therefore, he argues that the government cannot now revoke citizenship on the basis of information it already had.

We find this argument severely flawed. First, the government seeks to revoke Schmidt's citizenship because he was a guard at Sachsenhausen. There is no evidence that the government had this information at any time prior to the granting of citizenship to Schmidt. Further, it is clear that the Michael Schmidt referred to in the report is not *this* Michael Schmidt (the name is not that uncommon). No one suggests that Defendant herein was

ever at Mauthausen or that he was a guard on a death march from Vienna to Mauthausen. What appears fairly clear is that this information was passed to the people reviewing Defendant's application for a visa, and that they found that it referred to a different Michael Schmidt and disregarded it. We do not think that this is sufficient evidence to create a triable issue of fact as to whether the government was on notice that Defendant was a guard at Sachsenhausen concentration camp, particularly in light of the uncontradicted affidavits of Zipf (Exhibit 9.2), Lanius (Exhibit 9.3), and Reinfeld (Exhibit 9.5), all of whom state that they would have rejected Defendant's application if they had known Defendant was a guard at a concentration camp. Hence, we find no basis for Defendant's claims for laches and estoppel. They do not bar the granting of summary judgment in favor of the government.

Aside from the brief statement in Exhibit 6.4 concerning another Michael Schmidt, Defendant has presented no evidence to support its affirmative defenses. There has been no showing of prejudice, nor is there any other evidence that the United States knew earlier of Schmidt's activities and failed to act. To assert laches, Defendant must demonstrate lack of diligence and prejudice. *Kairys*, 782 F.2d at 1384. We find that Defendant has failed to raise any genuine issue of fact as to his defenses of laches and estoppel which would preclude summary judgment. He has failed to present sufficient evidence to support these defenses and the government is granted summary judgment on the questions of laches and estoppel.

Finally, we hold that laches and estoppel are not defenses to denaturalization proceedings. *See Federenko*, 449 U.S. 516-518 (in denaturalization, court may not consider the equities but must follow the statutory mandate of Congress); *Costello v. United States*, 365 U.S. 265, 281

(1961) (laches is not a defense against the sovereign); *Kairys*, 600 F. Supp. at 1264 (government cannot be barred by laches in denaturalization proceeding), *affirmed on other grounds*, 782 F.2d 1374 (expressly declining to rule on whether laches could ever be a defense to denaturalization). Therefore, we find that summary judgment in favor of the government is not barred by laches or estoppel.

Conclusion

Summary judgment is granted to the United States on Count I. Defendant's citizenship is revoked, his Certificate of Naturalization is cancelled, and he is ordered to surrender and deliver the Certificate of Naturalization to the Attorney General.

ENTER:

/s/ PAUL E. PLUNKETT
United States District Judge

DATED: January 3, 1990